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Burt Neuborne

Burt.Neuborne@chicagounbound.edu

Frederick A. O. Schwarz Jr.

Frederick.Schwarz@chicagounbound.edu

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A Prelude to the Settlement of *Wilder*

Burt Neuborne[†] and Frederick A. O. Schwarz, Jr.^{††}

This dialogue never took place. Our purpose in attempting it is not to reconstruct an historically accurate picture of an actual negotiation but to raise questions about the role of consent decrees in so-called “public interest” litigation. To do so, we have attempted a wholly fictional conversation about settlement between two lawyers engaged in litigating a complex constitutional case. Although many of the points raised in the dialogue emerged out of discussions surrounding a particular case—*Wilder v. Bernstein*¹—the issues raised in the dialogue are broader than the merits of the *Wilder* settlement. In the interest of raising issues and reflecting an amalgam of many voices, we have each articulated points that do not reflect our respective personal views and that have little or nothing to do with *Wilder*. In the interest of a minimally coherent organization, we have couched the dialogue so that one participant poses pro-settlement arguments while his opponent argues against settlement. In fact, each of us holds more complex views about the consent decree process than the dialogue allows either of us to reflect.

A word should be said about the actual *Wilder* settlement. While each of us participated in the negotiations, the document is very much the work of the able and dedicated lawyers who had principal responsibility for litigating the case—Marcia Lowry, Michael Mushlin, Chris Hansen and Lauren Anderson, on the American Civil Liberties Union (“ACLU”) side; and Diane Morgenroth, Michelle Ovesey and Gary Shaffer, representing the

[†] Professor of Law, New York University Law School; National Legal Director, American Civil Liberties Union, 1982-86.

^{††} Partner, Cravath, Swaine & Moore; Corporation Counsel, City of New York, 1982-87.

¹ The *Wilder* litigation was commenced in June, 1973. *Wilder v. Sugarman*, 73 Civ. 2644 (S.D.N.Y. June 14, 1973). The history of the litigation is recounted in *Wilder v. Bernstein*, 645 F. Supp. 1292, 1297-1304 (S.D.N.Y. 1986) (approving settlement). The *Wilder* litigation challenged the constitutionality of New York City's use of religiously affiliated institutions as the principal components of its residential and foster-care programs for troubled or abused children. Plaintiffs alleged that the system violated the Establishment Clause and resulted in systematic racial and religious discrimination in access to quality treatment facilities.

City of New York.

Although this dialogue is not in any sense an historical account of the *Wilder* negotiations, we do expect and invite analysis and appraisal of the *Wilder* settlement in light of the issues raised in the dialogue. In that regard, we welcome the critique offered by Professor Epstein and have each offered a brief rebuttal.

INTRODUCTION

The *Wilder* litigation was commenced by the Children's Rights Project of the American Civil Liberties Union in an effort to challenge New York City's reliance on religiously affiliated institutions as a principal component of its publicly funded program of care for children in foster or residential placement.

Unlike the experience of many American cities, New York City's child care network began as a series of religiously affiliated child-care agencies that were privately funded to serve co-religionists. Over the years, the private agencies accepted responsibility for children of different faiths and accepted substantial public funding. At the commencement of *Wilder*, plaintiffs estimated that more than 70 percent of the agencies' operating budgets were publicly funded. The religiously affiliated agencies generally gave preference in admission to co-religionists, often in accordance with an expression of a parental desire for in-religion placement. Plaintiffs were troubled by four aspects of the New York system. First, plaintiffs believed that the Establishment Clause forbade public funding of religiously affiliated child-care agencies, especially when preference in admission was given to co-religionists whose parents requested in-religion placement. Second, plaintiffs believed that the operation of New York's system funnelled black, Protestant children to agencies of lower quality, while providing white Catholic and Jewish children with a greater chance of finding a place in the often higher quality agencies operated by Catholic Charities and the Federation of Jewish Welfare Agencies. Third, plaintiffs feared that children assigned to a sectarian agency would be unable to exercise their religion freely if it differed from the sectarian agency. For example, teenagers placed in Catholic agencies were often unable to secure information on family planning. Finally, plaintiffs believed that the natural distribution of religiously dominated placement resulted in an unacceptable degree of racial segregation.

Defenders of the New York system argued that the City had an obligation to respect the wishes of parents for in-religion placement if possible and that the system's placement decisions were

dominated by legitimate therapeutic judgments. The agencies argued that the unique necessity of reconstructing a family environment for children in residential or foster placement made it not merely desirable, but mandatory, for the City to utilize religiously affiliated agencies when therapeutically appropriate. Defendants firmly denied an intent to segregate and argued that, by the time *Wilder* was close to trial, New York's system was overwhelmingly nonwhite, with no discernible pattern of racial segregation.

Defendant: Our predecessors haven't had much luck talking about settlement. Let's try a new tack. Instead of starting with the precise issues raised by *Wilder*, let's talk more generally about the pros and cons of settling cases like *Wilder*. Maybe a more abstract discussion will clarify the obstacles to settling *Wilder*. Frankly, I'm of two minds on settlement, but it is an option that should be closely explored.

Plaintiff: O.K. I, too, have my doubts about whether settlement is either possible or desirable, but we might as well give it a try. Just so we don't get bogged down in cross-arguments, let's assume roles for the sake of a coherent discussion. You present the argument for settlement; I'll argue against it. I know that will cause each of us to overstate our personal positions, but it should help in getting the issues onto the table quickly.

D: All right, as long as you recognize that in arguing for settlement, I'm not conceding a flaw in my case or a weakness in my negotiating position.

P: Fair enough. Open the bidding.

D: Isn't it time that we talked about settling *Wilder*? The case is almost ten years old.² It's already consumed enormous resources—yours, the City's and the courts'.³ There's just no reason to keep redoubling our efforts to the point where we lose sight of our goals.

P: I suppose we should seek a settlement. Every handbook of lawyers' behavior says so. I'd probably be drummed out of the Bar Association if I refused to make a real effort to settle. You'd probably drop Rule 68 on me.⁴ Yet, aren't you troubled over the pros-

² See note 1.

³ Judge Ward noted that over 750 documents had been filed with the court during the pretrial proceedings. 645 F. Supp. at 1297.

⁴ Fed. Rule Civil Proc. 68. See text at pp. 199-206 for a discussion of Rule 68 in the context of the *Wilder* litigation.

pect of settling public interest cases that raise fundamental constitutional questions?⁵ Wouldn't we all be better off if the important legal issues raised in those cases were judicially determined once and for all, especially given the resources that are usually invested in such a case?

You urge me not to lose sight of goals, but I'm just not sure whether a public interest client's goals are advanced by a resolution of the case that leaves the basic constitutional issues open and the challenged system in place, even if the system were to be substantially improved by a settlement.

D: You can't be serious about never settling. The judicial system would either collapse or consume unlimited resources if it were asked to decide every case on the merits or even every public interest case on the merits.⁶ Settlement is the only economically feasible method of resolving disputes on a large scale. Even if settlement were less desirable than a full-dress decision on the merits—and I certainly don't concede that it is—it would be a necessary evil; like plea bargaining in the criminal context.

My point is not only that settlement is a necessary component of any sizable dispute resolution system; in many cases I believe that it is a preferred method of resolving the dispute, not merely because it's more efficient, but also because it's more just.⁷

P: That's a strong statement. Let's take the two components separately—efficiency and justice.

Efficiency first. If what you're saying is that settlement of public interest cases is a price we pay for living in a complex society that can't or won't expend enough resources to permit formal adjudication on the merits, I agree with you. Viewed that way, settlement is a compromise with justice. It's the best that we can—or wish—to do. I'll call that the "pure efficiency" argument for settlement over adjudication: settlement is better because settlement is cheaper. If settlement is really just a bargain-basement form of justice that is better than nothing, but less desirable than the real

⁵ See Owen M. Fiss, *Against Settlement*, 93 *Yale L.J.* 1073 (1984); Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 *Harv. L. Rev.* 668 (1986).

⁶ See Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 *U.C.L.A. L. Rev.* 4 (1983).

⁷ See Robert A. Bush, *Dispute Resolution Alternatives and the Goals of Civil Justice: Jurisdictional Principles for Process Choice*, 1984 *Wisc. L. Rev.* 893. Compare Andrew W. McThenia and Thomas L. Shaffer, *For Reconciliation*, 94 *Yale L.J.* 1660 (1985) with Owen M. Fiss, *Out of Eden*, 94 *Yale L.J.* 1669 (1985); and compare Frank H. Easterbrook, *Justice and Contract in Consent Judgments*, 1987 *U. Chi. Legal F.* 19 with Owen M. Fiss, *Justice Chicago Style*, 1987 *U. Chi. Legal F.* 1.

thing, shouldn't I insist on first-class justice for my client and hold out for adjudication?

D: I don't for a moment equate a properly bargained settlement of a complex constitutional case with bargain-basement justice. In fact, as I suggested a moment ago, settlement is often preferable to adjudication as a matter of justice, not merely cost. But I understand that you want to defer the justness of settlement for a moment and discuss only the "pure efficiency" argument for settlement.

Even if I were to accept your pejorative characterization of the "pure efficiency" argument for settlement as bargain-basement justice, settlement is often a preferable option. Bargain-basement justice is better than Chapter 11 justice, which is where a blind preference for adjudication would take the system. Imagine a world without settlement or, more realistically, a world in which settlement is viewed in a grudging way as an undesirable way of terminating a lawsuit. How many years would everyone have to wait in such an "ideal" system to get the attention of a judge, much less to convene a jury? What would be the quality of justice dispensed by such a bloated system? How much money would it cost you to process a single civil rights claim to judgment? How long would a civil rights plaintiff have to wait for any response to a complaint?

Moreover, suppose you're right and settlement will result in bargain-basement justice that gives your clients less than they—and you—think justice requires. Who appointed you as the ultimate arbiter of justice? You know as well as I do that in most constitutional cases, plausible arguments exist on both sides. Each side justly claims justice as an ally. What if a judge ultimately agrees with my idea of justice and rejects yours? Would you accept that as "first-class" justice? In an uncertain world, don't you do your clients a disservice by gambling on whose conception of justice will finally be endorsed by the judge as "more just?" Why not take the "sure thing" that a settlement offers? I tell you quite candidly, that's the only reason I consider settlement: because I'm afraid that I might be worse off if I went to trial. I don't have to think you're correct on the law in order to consider settlement; merely that some judge may agree with you and leave my client—and the City—worse off than under a negotiated settlement. Shouldn't you be thinking the same way about your clients?

P: In most private law disputes, where what's at stake is easily quantifiable in money terms and the lawsuit turns on the application of relatively settled norms to contested facts, I find your arguments persuasive. If *Wilder* were such a case, we would have

settled it years ago. But I'm not sure that the "pure efficiency" argument in favor of settlement—or even the more powerful "uncertainty" argument you just made—carries nearly as much weight in constitutional cases that have a public dimension. Money isn't what's really at stake in those cases. It's constitutional principle and it's not for sale.

D: Even if I agreed that there is a fundamental difference between old-style "private" litigation and new-fangled "public" litigation—and I'm not all that certain there is—both the "efficiency" and "uncertainty" principles argue strongly for the settlement of even the so-called "public" action under certain circumstances.⁸ The public interest bar is certainly not blessed with unlimited resources—quite the contrary. Wise management of those scarce resources appears to me to call for the use of settlement as a cut-rate method of advancing client interests. If nothing else, settlement allows you to turn your case inventory over in an acceptable time frame instead of becoming bogged down in interminable and expensive litigation. In fact, if anyone has an incentive to eschew settlement in public law cases, it is the more generously endowed government defendant. Over time, a no-settlement policy would bleed the public interest bar dry.

P: Your point is a troubling one. Even if I thought it a good idea to turn over my case inventory at periodic intervals, I could not permit my judgment about settlement to be influenced by the general economic health of the public interest bar—or by the condition of ACLU resources. Surely, it would violate the canons to allow such economic judgments to color the decision whether to settle.

D: I'm not sure why that's necessarily so. Private lawyers always consider resources in deciding whether to settle. If you believe the market theorists, it's all they consider. Why shouldn't public interest lawyers consider similar factors in thinking about settlements? I'm not urging you to settle because it benefits you economically. I merely want you to be aware of the beneficial economic consequences of settlement in deciding whether it is an appropriate—or even preferred—mechanism for terminating many constitutional cases. Remember, by the way, I'm making this economic argument in favor of settlement just to get the point on the table. If this were real life, you'd be urging me to settle because it

⁸ See Owen M. Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 Harv. L. Rev. 1 (1979), and Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 Harv. L. Rev. 1281 (1976), for a description of the "public action."

would be in your economic interest.

P: Frankly, I'm not enthusiastic about importing concerns about resource scarcity from the private to the public arena as a settlement consideration. It's bad enough that some private litigants are driven to settle by resource constraints. Why compound the evil by urging public interest lawyers to act the same way?

D: You misunderstand me. I'm not in favor of resource scarcity. I wish everyone had enough of everything to do all they wish. But they don't, and you know it. Resource limitations are facts of life that just cannot be ignored by private or public lawyers. If you refuse to consider the economic implications of an anti-settlement policy out of a sense of ethical duty, all you're doing is shifting the ultimate cost to unknown persons who cannot obtain your services because you've used up your resources in existing cases. I'm not even sure it's a good idea to think about public interest litigation as a phenomenon unconstrained by market forces. Without the discipline of resource constraints, I fear that the process of public litigation would spiral out of control and become bogged down in the personal egos of the participants.

I do understand, though, your uneasiness about compromising a client's interest for economic reasons, so let's turn to the client's interest. I wouldn't settle just for economic reasons, so I won't urge you to—even for the sake of argument. Our clients' interest should be the dominant issue in deciding whether to settle. Are you convinced that your clients will be better off after a full-scale adjudication? If you are, don't settle. If I were sure that my clients—and the City—would be better off if we went to trial, I would never settle. So let's turn to the "uncertainty" point.

Are you confident that you'll prevail in *Wilder*? Even if you prevail, do you have a clear picture of what the remedy will look like? Doesn't the uncertainty principle function with even greater force in constitutional cases—especially now, when we may be at a major turning point in the evolution of Supreme Court doctrine?

P: The short answer is that I think I'll prevail; but it's obviously impossible to predict with certainty how the Establishment Clause and race issues will be decided. But, if I have to guess, I'd say there's a 70 to 80 percent chance we'll win.

D: What about remedy?

P: Once the constitutional issues have been litigated and decided in our favor, a remedy will evolve naturally from the judge's decision on the merits. I'm not certain precisely what it will look like, but it will invalidate the present system.

D: If you're so certain you'll win, there's not much to negoti-

ate about. Except, even if you were to win, it will take years and cost a fortune and you really have no idea of what the ultimate remedy will look like. Even if you win, your clients may well lose. You may win a theoretical victory and leave the foster-care system a smoking ruin. How will kids be better off by driving the best agencies out of business? One reason I'm willing to consider a settlement that I wouldn't ordinarily want is that I don't want to risk a judge accepting your position—not just because I don't like to lose, but because I think the practical consequences for the City's children would be terrible if you won. And if you were to lose, you'll validate a system you think is awful and leave it wholly unchanged. Moreover, even if you were to win on the law, a court is constrained by a number of factors in imposing a remedy. Judges are conscious of both federalism and separation of powers concerns that limit their willingness to impose detailed remedial decrees. Judges are—or should be—highly conscious of their ignorance of the systems they're called upon to reconstruct. Any remedy imposed by a judge, who, at best, has an imperfect knowledge of the system, risks being cumbersome and impractical. Isn't it much more likely that a negotiated settlement will actually work in practice, precisely because it reflects the practical knowledge of the parties? If that's so, why isn't settlement the best move for your clients, even if you think you'll win on the merits? From my standpoint, settlement is an option precisely because, given the risk of litigation, my client is likely to be better off settling. Why aren't you in the same boat?

P: Perhaps I am, but there are at least four reasons why I'm very troubled about settlements in public interest cases in general, to say nothing of my belief that this particular case can't be settled because the positions are fundamentally irreconcilable.

D: Let's deal with the general objections first. Then we'll turn to the specifics.

P: My first concern arises out of your observation a moment ago that the power relationship existing between the plaintiff and defendant in most public law cases generally favors the defendant. Without dressing the process in fancy clothes, public interest litigation is generally commenced on behalf of politically weak individuals or groups who seek to alter a status quo that has been imposed by more powerful participants. That status quo can be expressed in legal or economic terms, but the bottom line of much—I think most—public litigation is an attempt to alter the legal or economic status quo in favor of persons or groups who couldn't achieve the same results through the democratic or ad-

ministrative process. The essence of public interest litigation is the invocation of the judge as an "equalizer" who can articulate and enforce so-called "rights" that improve a weak person's position. Settlement, as a process, excludes the judge as equalizer and, thus, eliminates the ability of the weak to confront the strong on relatively equal terms. Won't settlements negotiated between grossly disproportionate parties merely reinforce the status quo instead of seeking to alter it? In fact, didn't you just tell me a minute ago that I should consider resource scarcity as a factor in settlement? When you talk about turning my inventory over, aren't you really asking me to accept shallow amelioration of the status quo instead of seeking fundamental alteration? Band-aids instead of surgery?

D: I don't really think so. Even if there is a great divergence in power and resources between plaintiffs and defendants in public law cases—I'm not sure that's always true, by the way; in the Tennessee creationism case,⁹ for example, the ACLU clearly had more resources than the State of Tennessee—the effects of the imbalance in resources will only be exacerbated by insisting upon adjudication. Adjudication will consume far more resources than settlement and the outcome will inevitably be skewed by the resource imbalance. You and I both know that resource imbalance affects outcome. Judges are terribly dependent on the quality of the submissions—both legal and factual—made to them by the parties. While many judges do try to even up the imbalance by appointing counsel or masters, the judicial capacity to even the scales is quite limited in our system. I'm not at all certain, therefore, that you aren't better off with settlement—even from an exclusively resource-centered view. More fundamentally, though, I think you're wrong in assuming that settlement excludes the judge as "equalizer." I assume that when you equate the judge with an equalizer, you don't mean that literally. You mean the judge acting as an oracle who articulates and enforces rights that the law guarantees to the weak—rights that can be enforced by the judge against the strong. It's not the judge who is the "equalizer," but the law that he or she interprets and, of course, occasionally creates. By depicting the judge rather than the law as the equalizer, I fear that you exaggerate the judge's role. Adjudication can't take place without a judge. Settlement often—but not always—does not involve the judge. But both adjudication and settlement take place in the "shadow of the law."¹⁰ With or without a formal judicial presence,

⁹ *McLean v. Arkansas Bd. of Ed.*, 579 F. Supp. 1255 (E.D. Ark. 1982).

¹⁰ Robert H. Mnookin and Lewis Kornhauser, *Bargaining in the Shadow of the Law*:

the settlement of a complex constitutional case takes into account the state of the law and can be described as an attempt by the lawyers to rearrange the status quo in accordance with a probabilistic assessment of what a judge is likely to rule the law requires.¹¹ I'm interested in settlement only because my assessment of your legal case is such that I recognize a possibility that you'll win. You, on the other hand, recognize a possibility that you'll lose. Isn't a settlement merely the reduction of those possibilities to concrete terms? Resource constraints and extraneous factors like personality and short-term advantage enter into the equation, but isn't the result of careful negotiation in constitutional cases a reflection of the lawyers' predictions on ultimate success on the merits? If that's true, the law acts as equalizer in the settlement process, but it speaks, not through the mouth of the judge, but through a lawyers' chorus, after consultation with their clients.

P: Your analysis depends on several critical assumptions which simply may not be true in the real world. It assumes that resource imbalance won't stampede plaintiffs into settlements that undervalue the legal strength of their claim. It assumes that the settlement process is designed to—and actually does—result in an equilibrium keyed to the strength of a plaintiff's claim. It assumes that parties really create a "bargain in the shadow of the law" by reducing probabilistic assumptions to concrete compromises. Most importantly, it assumes a relative uniformity of knowledge and outlook by the participants that will allow them to reach consensus. It overlooks, I'm afraid, a fundamental aspect of much public litigation—the degree of passion with which particular views are held. The pure probabilistic model must be supplemented with an intensity or, if you will, an irrationality factor that may well throw your calibrations out of joint.

I concede, though, that if a general imbalance of resources exists between plaintiffs and defendants in public interest cases, plaintiffs will be worse off over time by forcing everything into adjudication. So I guess you've dealt with my first objection.

D: I should quit while I'm ahead, but there's yet another answer to your resource-imbalance point. I think that you substantially overstate the imbalance, especially at the settlement stage. A careful, modestly funded public interest lawyer can bring real pressure on an intimidating government entity in at least three ways. A

The Case of Divorce, 88 Yale L.J. 950 (1979).

¹¹ See Melvin Aron Eisenberg, Private Ordering Through Negotiation: Dispute-Settlement and Rulemaking, 89 Harv. L. Rev. 637 (1976).

public interest lawsuit can tie up very substantial government resources that are needed to deal with other pressing issues. Merely because an absolute difference in resources exists doesn't mean that a government defendant is relatively better-off than a public interest lawyer who has the luxury of focusing on only one issue. Moreover, the pendency of a lawsuit can adversely affect the functioning of critical governmental systems. For example, litigation challenging a civil service test can freeze promotions and put tremendous pressure on systems that need the infusion of new blood. In such a setting, resource allocation really favors the plaintiffs. Finally, no official relishes the personal opprobrium of being found guilty of constitutional violations. Settlement will often be preferable to risking an embarrassing judicial condemnation.

P: You may be right that I've overstated the resource imbalance point, but for every official who settles to avoid the risk of judicial opprobrium there's another one who won't settle because it looks like a concession of wrongdoing.

D: Even if I agree with you on that point, your general resource imbalance argument isn't terribly strong. If the imbalance exists, it's only exacerbated by insisting on even more expensive adjudication; and it may well not exist in many cases. Let's hope your second objection isn't stronger.

P: O.K., here's the second objection. Even if I were persuaded that a strong preference for settlement would not, as a general rule, cause the outcome of litigation to mirror the general resource imbalance in society between the strong and the weak, I'm not certain how the lawyers in a public interest case should go about deciding what to give up in order to achieve a settlement. In an ordinary private case, both lawyers can depend on the clients to make sophisticated cost/benefit decisions necessary to settlement. In a public law case where the named plaintiffs are often highly unsophisticated and the bulk of the class often hasn't even come into being yet, how can a lawyer make the value judgments critical to settlement? Even if I had the hubris to try, how would I go about securing consent—both in the moral and legal sense? Isn't there an insuperable problem in placing critical value judgments, affecting both parties and non-parties alike, in the hands of self-appointed arbiters who have absolutely no accountability to the constituency they serve or to the public at large? Don't you have a similar dilemma as a government lawyer, since a settlement will often affect the lives of persons who, as a practical matter, have little ability to influence your judgment?

At least when a public law case proceeds to adjudication, an

official clothed with public authority makes the decisions. You may not like what a judge does, but at least the judge is a government official, constrained to act openly and in accordance with carefully articulated procedural safeguards. Settlement, on the other hand, unfolds in darkness, with poorly developed procedural protections. Aren't you concerned about a process of resolving highly significant constitutional disputes that routes a virtually unreviewable power to affect the lives of plaintiffs, defendants and the general public from a formally constrained judge to lawyers with almost no public mandate and no formal accountability? Even if some lawyers think themselves qualified to make the value judgments necessary for settlement, are we anxious to clothe lawyers generally with such a mandate for private lawmaking about public issues?

D: I never knew you to be so troubled about nondemocratic decision making. Couldn't a similar objection be lodged against adjudication itself? After all, adjudication permits a single, non-elected official to impose enormous burdens on individuals, most of whom are non-parties and never get any chance to affect the judgment. I do concede, though, that an important distinction does exist between public pronouncements by a judge and private lawmaking through settlement. A preference for settlement does risk vesting a disturbing amount of lawmaking power in lawyers, without providing much in the way of formal check or public accountability. You overlook, though, the fact that lawyers can't escape the decision whether to settle. If a lawyer, after analyzing the issues carefully, comes to the conclusion that his or her client risks worse treatment after adjudication than is likely through settlement, of course the lawyer should settle. The fact that third parties may be adversely affected by the settlement on either side shouldn't prevent a lawyer from making a deal that heads off the risk of something even worse. Unless you want to forbid settlement entirely whenever it affects third parties, such considerations should be handled by careful procedures that invite affected persons to participate in the settlement's formulation and to attack its fairness.

Also, as you pointed out a moment ago, the social changes wrought by settlement will, generally, be less drastic than changes brought about by successful adjudication. Given that fact, perhaps we should be willing to tolerate a lower level of official participation in the process. Where truly radical alterations are possible—as in adjudication—the participation of a judge as a formally sanctioned public actor is critical. Where less drastic alterations are likely—as in settlement—the need for a formally sanctioned process seems less dramatic.

More fundamentally, though, your concerns about legitimating the necessary consent and policing the settlement process as it affects third parties can be blunted, if not eliminated, by careful procedural constraints. Rule 23 currently requires a judge to hold a hearing before approving the settlement of a class action.¹² That hearing, if carefully conducted, should prove the vehicle for gauging the necessary consent and evaluating any objections by class members or affected third parties to the proposed settlement. I recognize that settlement approval hearings are often disturbingly pro forma, but the appropriate response is not to scrap settlement, but to upgrade the quality of judicial participation in assessing the existence of consent and the settlement's fundamental fairness. In fact, I believe a judge should encourage parties who are in the process of negotiating a settlement that affects third parties to include them in the negotiation process.

P: Aren't you putting an awful lot of weight on the ability of a judge to elicit consent and assess fairness? After all, by definition, a judge ought not to expend substantial resources on the settlement. If a judge spends as much time on the settlement as he or she would have on the adjudication, isn't the pure efficiency argument demolished? Can a judge scrimp on the commitment of resources to a complex dispute and still purport to assess the existence of consent and the fairness of the settlement? That's especially so if the settlement is supposed to represent a rough approximation of the probabilities of the outcome on the merits. If a judge does a serious job of assessing the probability of success and a serious job of examining the consent and fairness issues, why not adjudicate the case? It's precisely the designedly thin nature of judicial participation in the settlement process that exacerbates the danger of unfairness and shifts enormous de facto power to lawyers. On the other hand, I question whether it is wise to invest the necessary judicial energy to assure a real check on the lawyers instead of using that energy to adjudicate.

D: I don't underestimate the difficulty of the judge's task in evaluating the fairness of a settlement. I don't think it's any harder than adjudication, though, and it will probably consume fewer resources. Moreover, settlement seems to me to enjoy two significant process-based advantages. While adjudication is bound by formal evidentiary constraints, the participants in a settlement negotiation will often engage in an informal exchange of informa-

¹² Fed. Rule Civil Proc. 23(c).

tion and a flexible dialogue with experts that provides a richer and more complete factual base than would be available to an adjudicating court. Perhaps even more importantly, settlement doesn't require a dichotomous resolution of a dispute that may have a good deal of merit on both sides. It permits the parties to avoid an either/or resolution to a dispute that may not be amenable to such an approach.

P: That may be so, but it's precisely the limited judicial role in settlement that leads to my third objection. To be worthwhile from a plaintiff's standpoint, a settlement in a complex constitutional case must make a real dent in the status quo in favor of the politically weak group on whose behalf the case was brought. That means that someone who benefits from the status quo will often be unhappy with the terms of the settlement. I argued a moment ago that settlements had the real prospect of unfairly overlooking the interests of affected third parties. The flip side of that fear is that the affected third parties will resist implementation of the settlement. Altering institutional behavior patterns is like trying to turn the *Queen Elizabeth II* around with a paddle.

In order to have any hope of success, a settlement agreement that alters the status quo must be able to overcome the inertial drag of disgruntled critics, who generally have far more political clout than the settlement's beneficiaries. In my experience, the only hope of overcoming this inertia is a firm commitment from the court to exercise sustained and aggressive remedial oversight. Even in an adjudicatory setting, it is often impossible to persuade a judge to use all the remedial tools at his or her disposal to effectuate a judgment on the merits. But adjudication does give rise to two very powerful remedial arguments. Once an adjudication has taken place, the logic of the decision on the merits often dictates a remedy. That's what I meant when I said that if we win *Wilder*, a remedy will logically evolve from the nature of the decision. More importantly, though, once adjudication occurs, the integrity of the judicial process is put into play.

Recalcitrance by disgruntled critics of an adjudication threatens not only the particular gains made by the plaintiff group, but calls into question the very integrity of the rule of law. That's why *Cooper v. Aaron*¹³ is such a milestone. In a settlement context, though, neither engine is present to drive the remedial machinery. By definition, there will not have been a decision on the merits—so

¹³ 358 U.S. 1 (1958).

the remedy can't be logically linked to an unassailable claim of right. Moreover, the integrity of the settlement does not implicate the rule of law; it merely raises questions about privately negotiated arrangements. In fact, resistance to a settlement often has a stronger moral claim on the rule of law than adherence. After all, resistance is generally premised on the argument that innocent persons are being injured by a settlement that gives plaintiffs more than the law entitles them to. Without the motive force of an adjudication, I have very little confidence in the capacity of the legal system to enforce settlements that cause real dislocations in the status quo. If I'm right, a settlement is, at best, an illusory victory and, at worst, an act of positive deception.

D: If I thought you were right, I would actively discourage settlements in constitutional cases because it would be dishonest to make them. As an empirical matter, though, I think you're wrong; although I agree that no hard data exist that assess the degree to which public law settlements are, in fact, implemented. It's about time that someone carried out a serious empirical study of the efficacy of settlement in constitutional cases. But even in the absence of hard data, there are at least two powerful responses to your concerns.

First, you admit that even remedial orders following adjudication are, more often than you like, inadequately enforced. Moreover, even when a judge goes all out to enforce an adjudication, you recognize that transforming the decree into a genuine change in the status quo is often difficult. Have you considered why it is often so difficult to translate adjudicatory decrees into real world change? Isn't one important reason the difficulty of imposing significant change from the outside on an entrenched status quo that can frustrate change without formally disobeying the order? When you move from an externally imposed solution following formal adjudication to a consent-generated resolution following a genuinely participatory negotiation, isn't there a greater likelihood of voluntary—or at least grudging—compliance? And, doesn't that increased capacity for acceptance by genuine consent at least mitigate your concern over enforceability?

Second, I think that you significantly undervalue the judicial commitment to enforcing settlements in constitutional cases; especially when those settlements have been negotiated and approved pursuant to a participatory negotiation process that gives them a special claim on moral legitimacy. Given the efficiency arguments in favor of settlement, judges have a powerful incentive to make settlement an attractive option. That, in itself, translates into a

strong inducement to enforce them. In addition, once a judge places the imprimatur of the court on a consent decree, the integrity of the judiciary is at least partially implicated. The greater the judge's involvement in the process of assuring that a settlement enjoys the requisite assent of the affected community and is fundamentally fair, the greater the judge's commitment to enforcing it. When you combine the natural inducement to conserve scarce judicial resources with the special inducement to enforce settlements on which a judge has lavished attention, and prestige, enforceability does not pose that much of a problem. What problem it does pose seems outweighed by the greater likelihood of acceptance of a consensual arrangement.

P: Unfortunately, I fear that both the law and the facts weaken your argument. Courts have shown a disturbing tendency to permit defendants to avoid consent orders in two ways: by granting motions for modification based on changed circumstances; and by allowing defendants' claims of impossibility to justify failures to carry out settlement agreements. You can count on one hand the number of times a court has really used the contempt power to enforce a settlement. It just doesn't happen. I do agree, though, that increasing the judge's role in policing consent and fairness is likely to increase a court's willingness to use its power to enforce the settlement. But the more energy the judge—and the parties—must expend on the settlement process to assure its fairness and credibility, the less persuasive the pure efficiency argument becomes.

D: I think you're seriously misstating the issue of whether settlements should be flexible documents that can be modified to account for changed circumstances or just plain miscalculation. After all, even a judgment can be modified under appropriate circumstances. Why not a settlement? And even a judgment recognizes impossibility of performance as a legitimate issue. In fact, if you were to succeed in turning settlements into rigid straight jackets that threatened to develop into dysfunctional burdens, you would make it almost impossible for a responsible government official to enter into a settlement. I agree that a settlement shouldn't lightly be subject to modification; but it should be possible to mesh plaintiffs' concerns for certainty with both sides' legitimate interests in flexibility and adaptability. The answer can't be to give up on settlement because it's too rigid or too flexible, but to incorporate mutually acceptable mechanisms for modification or amendment into the consent decree itself.

P: Even if you're right about the enforceability of settle-

ments, I'm still troubled by a fourth fundamental objection to a strong preference for settling public law cases. It's an objection that flows from an ambivalence about the role of courts. Are they predominantly—or even exclusively—mechanisms for resolving disputes or are they engines for the articulation of appropriate norms of behavior? A strong preference for settlement seems to me to resolve this ambivalence in favor of dispute resolution without giving enough weight to norm articulation.

Especially in public law cases, I believe that the principal role of courts is the elaboration and enforcement of principles of public law. When we strongly encourage the settlement of public law disputes, don't we inhibit the judicial articulation of norms of behavior that protect the weak against the strong? As you mentioned earlier, strongly articulated principles of public law are the critical matrix within whose shadow settlement negotiations take place. More importantly, if the role of law is to induce general compliance with appropriately defined norms of behavior, a strong preference for settlement fails to advance that significant end. Rather, it establishes localized, hand-tailored rules that may well resolve a particular grievance and benefit affected parties, but do little or nothing about articulating general norms to which people may conform. In the public law area, such a subtle shift away from norm articulation limits the extent to which public interest litigation can aid the weak. If we cannot encourage the strong to comply voluntarily with self-restraining norms without resorting to litigation, the practice of public law will do little to ameliorate the plight of the weak. Settlement, as a process, doesn't generate those norms. Even if every settlement were just, were consented to by the affected parties, and were genuinely enforced, I'd still be concerned about a strong preference for settlement because of the inherently narrow impact that private lawmaking can have on the weak. Wouldn't lawyers like me be giving up the chance to effect widespread social change in return for a narrow set of non-replicable improvements?

D: I don't think so. First, a strong preference for settlement will not eliminate adjudication as a significant aspect of public litigation. We certainly do not appear to be in danger of cutting off the flow of judicially articulated rules of law. Some might say that we suffer from too much judge-made law. We certainly are not starved for judicial pronouncements. Thus, while your point is well-taken as a caution against forcing too many public law cases into settlement, I don't see it as a practical objection to a strong preference for settlement in a system which produces such a large quantity of formal adjudications.

P: That's only partially true. I don't want to interrupt your response, but fee-shifting proposals like the extreme version of Rule 68 and the tactics made possible by the *Jeff D.* case,¹⁴ may well radically diminish the likelihood of adjudication to the point where my concern is more than theoretical.

D: Let's put off talking about Rule 68 and *Jeff D.* for a moment. I agree that we should consider whether it's a good idea to apply pressure to force settlement in public law cases; but let's stick to your general objections to settlement for the time being. Your concern that a strong preference for settlement sacrifices general norm articulation for specific dispute resolution overlooks the potentially broad impact of a creative settlement. Much significant public law litigation is prosecuted as a class action, directly affecting the lives of thousands of class members. Whatever the validity of your concern in the context of the old two-party case, it doesn't seem nearly as acute in an era of massive class actions.

You also underestimate the general effect of a class settlement. While a settlement does not act as *stare decisis*, it does establish a benchmark against which similar disputes are measured. The evolution of a benchmark settlement exerts a broad influence on the resolution of similar disputes in much the same way that a persuasive opinion in one jurisdiction influences subsequent behavior in another. In fact, a nationwide Settlement Reporter wouldn't be a bad idea, especially in the public law area. Even at the level of norm articulation, therefore, I think your objection is overstated.

More fundamentally, though, I think you've allowed yourself to be trapped in a set of linguistic extremes. You're right, of course, in noting that courts resolve disputes and articulate general norms. You're also right in noting that settlement is more significant as a dispute resolution mechanism than as a norm articulation device. I think you're wrong, though, in assuming that those are the only functions a court can perform.

You recall that I argued a few moments ago that settlement might even be preferable to adjudication in certain settings. I said that because I believe courts can play a third role in public law cases. Most public law cases pit plausible claims against each other. Adjudication forces a dichotomous resolution of a dispute that may not be suited for an either/or resolution. Ordinarily, issues that aren't suited for dichotomous resolution through adjudication are routed through the democratic process. When that pro-

¹⁴ *Evans v. Jeff D.*, 106 S. Ct. 1531 (1986).

cess functions optimally, it provides a mechanism to evaluate and integrate the needs of conflicting interest groups. When, however, one of the interest groups is chronically weak, the democratic model often operates merely to reinforce the existing power imbalances. You tell me that much of the theory of public litigation is premised on the attempt to use adjudication as a way to shore up the positions of chronically underpowered interest groups. But adjudication as a dichotomous process often forces a court into an either/or posture in which the interests of one group trump the countervailing legitimate interests of another. Moreover, adjudication often risks an enormous dislocation that threatens innocent bystanders. Who'll be hurt if there is chaos in the foster-care system? Settlement provides an opportunity to create an artificial market mechanism for the orderly integration of conflicting interests that doesn't sacrifice one set of interests to another, but permits a hybrid solution reflecting an amalgam of the interests.

The settlement process permits a form of bargaining between politically weak interest groups, enjoying enhanced power because of perceived legal assets, and conflicting stronger groups. In an ordinary political setting, the strong groups would submerge the weak. In the insulated atmosphere of a settlement negotiation, the weaker groups are able to command greater attention and consideration because they possess a claim to external imposition of their position by a judge. Properly conceived, the settlement process is not unlike the give and take that characterizes democratic decision making, except that the relative weights of the contending groups have been rearranged by the introduction of legal assets. The net result of such a process should be the emergence of a brokered solution that takes into account the interests of the affected parties and that is roughly similar to idealized democratic decision making. In fact, you can characterize a properly orchestrated settlement as a form of private legislation that emerges from the resolution of a set of interests that have been externally strengthened and weakened by the prospect of ultimate intervention by a judge.

P: You're not describing a simple process of bilateral negotiation. If you're serious about pursuing the democratic analogy, it's necessary to assure representation for a host of affected interest groups. In a case like *Wilder*, you'd need a room the size of the United Nations just to accommodate the participants. Aren't you describing an enormously complex process that will almost certainly consume as much resources as adjudication?

D: Perhaps I am. I have no illusions about the amount of effort and resources that a fair and acceptable *Wilder* settlement

will require. But the interests at stake in a case like *Wilder* are too varied, the risks to the children too high and the values too evenly balanced for the case to lend itself to dichotomous resolution. It shouldn't be necessary to brand one side as "right" and the other as "wrong" to resolve the *Wilder* dispute. Nor should it be necessary to put the entire system of foster care at risk. Rather, in a case like this, where plaintiffs have a strong legal case, what's needed is a mechanism which both permits the interests of the politically weak plaintiff groups to contend fairly with the interests of the politically powerful defendant groups, *and* adequately accounts for the interests of other affected groups. Without a strong legal position advanced on behalf of the plaintiff, I wouldn't bargain at all, even if I thought the status quo were unfair; but given the strength of the legal assets that you've assembled on behalf of the plaintiffs, it seems to me that you're in an excellent position to renegotiate the status quo from a position that fairly approximates the needs of your clients. Your legal assets aren't substantial enough to make everyone else surrender; neither are mine; but both are too substantial to be ignored. If your political position were as strong as your legal position, you wouldn't need a lawsuit to redress the balance.

P: You're describing a much more ambitious process than a mere bilateral negotiation. If I understand you correctly, in order to assure a fair settlement to all affected persons, you want to create a participatory forum, not unlike a legislature, where the parties, after hearing from all affected persons, will seek to agree on a private statute that structures their future relationship; and where the interests of weak political groups are artificially enhanced by the prospect of outside interference on their behalf in the form of a threatened adjudication by a judge. The strength of the enhancement enjoyed by the weak group would be directly proportionate to the perceived likelihood of judicial intervention.

D: That's right, as far as it goes. But I'm also suggesting something more. The initiation of public litigation on behalf of a so-called victim group is both a plea for help to a judge and a form of notice to responsible governmental officials that a problem exists. Once a skilled public interest lawyer has marshalled the facts and the legal aspects of the problem, it's simply wrong to assume that government officials will wish to stonewall unless overrun by a judge. Often, government defendants themselves welcome litigation as an effective means of bringing a problem to the attention of decision makers with the power to do something about it. I'm suggesting that litigation as a prelude to a negotiated settlement may

not be unwelcome to bureaucrats who share a common grievance with the victim group. Each suffers from the inability of the group to command adequate notice in the political process. Each, it seems to me, shares a common interest in using litigation, not merely as a mechanism to invoke the outside intervention of a judge, but as a means to obtain attention and resources. A participatory settlement process serves the interests of both groups.

There are, of course, real limits to whether I, as a public official, would consider settlement.

First, and most importantly, I would never consider settlement unless I determined that the risk to my client from adjudication was greater than the cost of settlement. In the context of *Wilder*, for example, I wouldn't even think about settlement if I didn't fear that it was possible for you to prevail and that the consequences for the City's foster-care program if you did prevail would be worse than the effects of a settlement. Obviously, it's a subjective call, made after full consultation with my client, but it's precisely what lawyers are hired to do.

Second, despite your concerns over enforceability, I would not enter into a rigid settlement that could not be altered in an equitable manner to deal with future changes in circumstances. Not only would an overly rigid settlement threaten to disrupt orderly government, but it might well do unforeseeable harm to the so-called beneficiaries of the settlement. Nor would I enter into a settlement that I believed wrong in principle. As a public official, I don't think I should allow legitimate interests of expediency like cost, morale, political reputation, or even potential loss of the case, to stampede me into a settlement that I believe would be harmful to my client and the City.

P: That sounds like what I said about constitutional principle being non-negotiable. You argued that considerations of cost and uncertainty should lead me to settle even when I felt strongly that constitutional principle was at stake. Why shouldn't the same rules hold true for you?

D: Maybe they do. I assume that you wouldn't sign an agreement you felt was harmful to your client's ultimate best interests, no matter what the cost and uncertainty factors. I merely want to remind you that the same considerations preclude my entering into an arrangement that I think is harmful to the polity I represent. Finally, I don't think I should settle issues that I believe are ultimately reserved for democratic resolution. For example, if the City's basic charter provided that certain issues must be resolved by the legislative branch, I would not feel free to enter into a set-

tlement that short-circuited the democratic process. Of course, I realize that delicate questions of whether a so-called "constitutional right" trumps a democratic judgment are the essence of judicial review. I believe, though, that I must exercise self-restraint in settlement to assure that I do not assume an inappropriate degree of power that should be democratically wielded.

P: Once again, you seem to be articulating a mirror image of one of my earlier objections to settlement. Isn't your concern for democratic process very similar to my reluctance to assume the responsibility of giving away certain aspects of my client's case to achieve a settlement?

D: The concerns are similar, but your concern can at least be dealt with partially by a careful Rule 23 hearing. There is no mechanism short of adjudication that can release me from my obligation to respect the democratic process.

P: Aren't you really just saying that you won't settle unless there is a genuine argument that the law requires a decision by some means other than resort to the democratic process, or that the law proscribes certain outcomes, even if they are the product of the democratic process? Isn't that merely a restatement of the fact that settlements should roughly approximate the likelihood of success on the merits? Aren't you really just saying that you'll never settle a case that lacks a plausible theory on the merits because what you're really engaged in is a sophisticated form of risk management?

D: Perhaps so, but whatever its source, a sense of fidelity to the democratic process imposes real constraints on the ability of a government lawyer to settle constitutional cases.

Even with my concerns over unduly rigid settlements, potentially harmful settlements, and settlements that fail to respect the democratic process, I believe that settlements in constitutional cases can result in a more desirable resolution of a dispute than resort to dichotomous adjudication. Especially in a case like *Wilder*, where trial would exacerbate underlying tensions in the society and risk greater alienation between races and religions, I believe that lawyers have a special obligation to seek to resolve the dispute, not make it worse. In fact, if you won't negotiate, the City might well consider unilateral alterations of policy to make a bitter trial unnecessary.

P: Maybe you're right, but I'm still troubled by a sense that a strong preference for settlement is a step backwards in seeking to enforce the legal rights of the weak. In spite of your views on the desirability of a strong preference for settlement, though, I hope

you agree that the arguments for and against settlement in public law settings are sufficiently substantial that the decision whether or not to settle should be left to the good faith judgments of lawyers and clients, with the participation of as many interested persons as possible, and should not be subject to pressure—economic or otherwise. You may persuade me that settlement is a preferable option in public interest cases, but I hope you agree that neither of us should be blackmailed, bribed or otherwise coerced into a settlement that we feel is inappropriate.

D: Who's pressuring you?

P: Well, you haven't yet. But I'm waiting for you to play your Rule 68 card. Under Rule 68, you can place substantial pressure on me to accept a settlement that I believe does not conform to your participatory justice model. Under the current version of the Rule, you can present me with an unacceptable settlement, either because it fails to reflect a fair sense of the likelihood of ultimate judicial intervention or because it lacks a reasonable likelihood of being enforced. If I reject that settlement offer, I run a serious economic risk. If I don't do as well as the settlement offer after trial—in public interest litigation that's always a risk—Rule 68 precludes me from recovering statutory attorneys' fees for work done after the offer and forces me to absorb your post-offer costs, even if I prevail on the merits.

In effect, Rule 68 imposes substantial economic pressure on a public interest lawyer to accept a settlement that he deems less than fair. I agree that if a settlement offer is rejected in bad faith or without rational basis, some form of sanction, probably an economic one, is called for; but when a lawyer rejects a settlement in good faith, based on a rational assessment of the case, the lawyer has done nothing warranting sanction. Only a desire to force the lawyer to accept a settlement involuntarily can justify the imposition of an economic penalty on a lawyer who simply guesses wrong about the likely outcome of the case.

D: I'm not sure it's so terrible to force a public interest lawyer to bear the economic consequences of his misjudgment about a case's likely outcome. In the private litigation world, lawyers routinely pay an economic price for bad judgment. Do you think a private lawyer would get full time charges for time spent trying a case when he comes out worse than a rejected settlement offer? Why shouldn't a public interest lawyer have at least some economic incentive to think hard about a proposed settlement?

P: That's my point. He already has such an incentive. Under existing rules, he must be the "prevailing party" to qualify for

court-awarded attorneys' fees. A settlement that favorably alters the status quo on behalf of the plaintiffs qualifies him for fees. If he rejects such a settlement and loses the adjudication, he is out of luck in terms of court-awarded fees. Thus an attorney already has a powerful incentive to accept a reasonable settlement because it assures him a fee.

All Rule 68 does is to pressure the lawyer by threatening him with loss of fees if he guesses wrong about the ultimate remedial outcome of the case.

D: But why should he be paid full value for guessing wrong?

P: Because Congress recognized that public interest litigation—even your participatory settlement version—can't flourish in the absence of an economic incentive. Congress, when it passed Section 1988,¹⁵ hoped to induce the bar to act aggressively in enforcing public law rights by assuring lawyers that if they won, they would receive a reasonable fee for services rendered. Unless we want to skew the settlement process in favor of defendants, the attempt by a lawyer to obtain what he reasonably believes is a just remedial outcome is precisely the type of aggressive activity that Congress wanted to encourage. Rule 68 simply frustrates Congress' judgment.

D: I wonder whether it's accurate to call a lawyer who turned down a settlement and then did worse at trial a prevailing party. From and after the settlement offer, he didn't prevail and, even without Rule 68, using the *Hensley*¹⁶ test for fees, I see nothing terrible in discounting post-offer time in deciding on a reasonable fee.

P: I think you're looking at the wrong moment in time. If you snap the shutter after adjudication comes out less favorably than a rejected settlement, of course the lawyer looks bad. But the proper point of scrutiny is at the point the lawyer is deciding whether to accept a Rule 68 offer. If, at that point, he accepts what he considers to be an inadequate settlement because of pressure generated by Rule 68, we'll never know whether adjudication would have resulted in a better deal for the plaintiff. Thus, Rule 68 shouldn't be viewed merely as a penalty for guessing wrong, but as a strong disincentive to guessing at all.

Even if we disagree about the wisdom of current Rule 68, I

¹⁵ 42 U.S.C. § 1988 (1982).

¹⁶ *Hensley v. Eckerhart*, 461 U.S. 424, 440 (1983) ("A reduced fee award is appropriate if the relief, however significant, is limited in comparison to the scope of the litigation as a whole.").

hope you agree that the proposal to amend the Rule to permit defendants' attorneys' fees to be shifted to the plaintiff is untenable. Under the proposed rule, if a plaintiff turns down a settlement and subsequently fails to prevail, he becomes liable for the post-offer attorneys' fees incurred by the defendant. When you drop that blockbuster on your delicate settlement process, you completely destroy the capacity of the weak group to conduct effective bargaining. Once defendants make a Rule 68 offer, the risk of turning it down would be much too high for virtually all public interest clients. In effect, instead of bargaining, you would have settlement by the unilateral fiat of the defendant.

D: I agree that fee shifting, as opposed to a denial of fees, may be too blunt an instrument to use to induce settlement. It would seriously compromise the atmosphere of free bargaining that I believe critical to the integrity of a participatory settlement. But I thought the proposed amendment to Rule 68 was withdrawn.

P: It's currently under study.

D: A version of Rule 68 that lets me threaten your client and you with a ruinous liability if you reject my settlement would certainly make life easier for me. I certainly wouldn't have to persuade you about the wisdom of settlement and my offer wouldn't have to be as generous. But settlements extracted under such coercive circumstances are subject to all of your general objections and can't be defended as a truly participatory process. So I guess I agree with you that Rule 68 should not authorize fee shifting—though fee shifting is certainly appropriate when a settlement is rejected in bad faith or without rational basis.

Aren't you unduly preoccupied by Rule 68, though? In a case like *Wilder* where all that's at stake is injunctive relief, isn't it virtually impossible to say that the injunction you finally get, if you prevail, is "worse" than the settlement offer? How can the two be compared?

P: You're right. When injunctive relief is at issue, it's awfully hard to apply Rule 68, but some courts claim to be able to do so and lawyers can't be certain about the outcome.

D: You're very quick to argue that plaintiffs shouldn't be blackmailed into what they believe to be inadequate settlements through fear of having to pay the defendants' attorneys' fees. Would you be as quick to concede that defendants should be able to enter into settlements without risking a ruinous award of fees against them? In other words, would you be willing to negotiate the size of your fee at the same time we discuss the merits?

P: I can't. It would place me in a direct conflict of interest

with my client. The higher my fee, the lower my client's recovery—and vice-versa.

D: You know, of course, that under *Jeff D.*, I can offer you a settlement conditioned on a waiver of your Section 1988 fees.¹⁷ That creates a powerful economic inducement for defendants to offer attractive settlements, since settlement may avoid a substantial fee award. Clients will be better off, even if their lawyers are not.

P: Such an offer places a lawyer in an untenable ethical position.

D: The Supreme Court doesn't think so. It's really no worse than the tension existing in a contingent fee setting when a defendant makes an offer that may create a conflict of interest between a lawyer and client.

P: In a contingent fee setting, there is generally a preexisting contractual arrangement between consenting adults. The agreement often provides for a means of resolving the potential conflict. At a minimum, the retainer evinces a conscious recognition and acceptance of the possibility of conflict. Most public interest litigation involves plaintiffs who are in no position to bargain over the terms of representation. When a public interest lawyer is confronted with a settlement that appears to be in the best interests of his client, he has no choice but to accept it. There is no morally acceptable mechanism for obtaining consent from a powerless and often desperate client that would enable a lawyer to turn down a settlement that helps the client but badly hurts the lawyer. In fact, a combination of proposed Rule 68 and *Jeff D.* creates a potential whipsaw, forcing a lawyer to accept an inadequate settlement in order to insulate the client from the risk of fee shifting; and to waive fees as the price of obtaining the inadequate settlement. It turns your exercise in participatory renegotiation into a charade.

D: I agree that a combination of proposed Rule 68 and *Jeff D.* would prove lethal to a serious negotiation process. We aren't at that stage yet, though, are we? Can a *Jeff D.* offer that is conditioned on a waiver of fees satisfy Rule 68, since it doesn't cover accrued costs? I hope you note that I'm not threatening you with fee shifting or forcing you to waive your fee, precisely because I do not want to poison the negotiation process.

P: Even if you can't use a *Jeff D.* offer as a Rule 68 offer, you can make them one after the other. Thus, you can make a Rule 68

¹⁷ See *Evans v. Jeff. D.*, 106 S. Ct. 1531, 1542-43 (1986).

offer that includes your version of accrued costs. If I refuse it, you can then make a *Jeff D.* offer and compel me to discuss the matter with my client. Or you could reverse the order. Aren't you obliged by your duty of representation to whipsaw me if you can?

D: I don't think so. Let's put aside for a minute the discussion of adversary process and negotiation. I thought we'd talk about that problem when we take up your point that negotiations are futile because our positions are fundamentally irreconcilable. I want to go back to the *Jeff D.* point for a minute, though. I agree, under the conditions of this case, that an offer conditioned on a waiver of fees seems to fly in the face of the spirit of Section 1988, although I would feel differently if I thought your legal position were much weaker. When the strength of a plaintiff's legal position is not the motivating force in inducing a defendant to settle, I don't think his lawyer should get fees under Section 1988, so I'd have no compunction about demanding a waiver. And, I do not agree that fees shouldn't be discussed as part of an overall settlement. I cannot be in a position to recommend settlement to my client until I have a good idea of the total exposure. It would be irresponsible to commit a government defendant to an expensive settlement that will alter the status quo—altering the status quo almost always costs a lot of money—without factoring the fee dimension of the case into the budgetary calculations.

P: But don't you see, that is exactly the conflict of interest situation I fear. Once a good settlement is on the table, I can't bargain much over fees because you know that if you stonewall, I'll eventually accept whatever you offer.

D: But don't you see, my duty to my client requires me to make an assessment of the total cost of a settlement and I can't do that without discussing fees. If you can't bargain when we include fees in our discussions and I can't bargain unless we do include fees, one of two things will happen: I'll eventually get tired of waiting and make a Rule 68/*Jeff D.* offer that will put you under intolerable pressure to accept a dictated settlement; or negotiations will collapse. Isn't there some way to put fees on the table in a way that won't unfairly pressure you or unfairly prejudice my client? What if we negotiate the settlement first and then turn to fees only after we have an acceptable deal on the merits?

P: That's only marginally better. If acceptance of the settlement is conditioned on a subsequent fee agreement, we may have delayed the conflict, but we haven't avoided it. I'll still be put in a direct conflict with my client.

D: We may have an impasse here. I don't want it to prevent

us from exploring a settlement. Suppose we agree to disagree on the negotiability of fees for the time being. If we can't find a settlement formula for the merits, the fee issue will be academic. If we do find a constructive way to settle the merits, I can't believe the settlement would founder over fees.

P: That's just it. I couldn't let it founder over fees, so I'd have to take whatever you offered.

D: I can only promise you that if we bargain in good faith on the merits and reach an acceptable settlement, I won't put you in an untenable position on fees. I'll either rely on the court to set fees under the *Hensley*¹⁸ rule, or try to reach a figure that seems fair. Unless I have a sense that you're trying to hold me up, I'll bargain over fees without threatening to withdraw the settlement. You'll have to trust my sense of fairness. When all is said and done, I may elect to argue the fee issue before the court, relying on the fact that, by definition, you were only partially successful and your time charges should be proportionally reduced. In any event, let's not allow the fee disagreement to block negotiations.

P: O.K., but I'm very nervous about starting down the path. If we reach a settlement that I think is desirable, I'm really powerless to resist you on fees. Many lawyers—perhaps correctly—won't take that chance.

D: Don't forget, you do have some protection. You can ask the court to adjust your fee as part of the hearing on the settlement's fairness.

P: Only if you agree to allow the court to do so. If you condition the settlement on a specific fee arrangement, I'm not certain that a judge has power to keep the settlement but adjust the fee.

D: Perhaps that's the way out of the impasse. If I promise to allow a judicial amendment of the fee, we can negotiate on both fees and merits and at least attempt to reach a package solution. If we can't, the agreement can go to the judge and you can argue for an upward modification.

P: That's a little better. But why would you agree to such an arrangement when you can force me into one that puts more pressure on me?

D: For two reasons, neither terribly altruistic. First, I really do want to settle *Wilder*. I think it would be better from everyone's standpoint—but especially my client's—to get the lawsuit over with and stabilize a critical system. In addition to stabilizing

¹⁸ *Hensley v. Eckerhart*, 461 U.S. 424, 440 (1983).

the system, I want to limit the risk to the system and to the children it serves. If you win—and you may win—the consequences for my client and for the children involved will be dramatic. If I can control those consequences through settlement in an acceptable and fair manner, of course I want to try. I don't want negotiations to founder on the collateral question of fees. The second reason is more complex and, perhaps, more controversial. It stems from my belief that public interest litigation involves ongoing relationships between plaintiffs and the government. Unlike much litigation, which involves one-shot collisions between litigants, public interest litigation generally attempts to structure an ongoing relationship. Everything I've learned as a lawyer tells me to be wary of pushing adversarial methods to their limits when setting up an ongoing relationship. Whether it's a corporate merger or a long term employment contract, I've never viewed such negotiations as a zero-sum game in which the parties wage total war on one another.

Many lawsuits involve litigants who have no stake in a continuing relationship. Perhaps it's correct to view the settlement of such a one-shot case as a fight in which one side's gain is another's loss. And, of course, all litigation at the adjudication phase quite properly calls forth adversary behavior—although I question whether a pure adversarial model should govern certain aspects of litigation, like discovery. But the settlement of public interest litigation should, I think, call forth a different ethic, one that views the lawyer's role not merely as mechanically adapting the adversary process to negotiation, but as a collective effort to forge a continuing relationship that preserves the fundamental values underlying the opposing positions. I am interested, not merely in ending a lawsuit, but in settling the underlying dispute in a way that will enhance the chances for a continuing relationship that, if not harmonious, at least will prove tolerable. I don't think a blind insistence on pursuing every adversary advantage is calculated to lead to that end.¹⁹ Even if I could bludgeon you into an unfair settlement, it's just not in my client's long-term interests to do so. The underlying dispute would only break out tomorrow in some other form. So don't be so surprised that I'm willing to eschew the Rule 68/*Jeff D.* whipsaw. I'd like to try a different process, one that stresses the cooperative nature of the enterprise. We should try to identify the core values underlying the conflicting positions and

¹⁹ For a review of recent writing on whether negotiation should be viewed as an adversarial or as a cooperative process, see Carrie Menkel-Meadow, *Legal Negotiation: A Study of Strategies in Search of a Theory*, 1983 Am. Bar Found. Rsch. J. 905.

design a structure that respects as many of those core values as possible. If the values are in irreconcilable conflict, we'll try to design a structure that minimizes the collision. Once we've designed such a structure, we'll open it to all interested parties for participatory criticism and appropriate modification. If we're successful, we should be able to minimize the collision between establishment and free exercise values, while assuring racial equality and increased quality of care.

P: You mean a first-come, first-served system that uses publicly-funded religious agencies; that eliminates race and religion as a factor in gaining access to quality facilities; and that gives effect to parental wishes whenever possible.

D: There, you've done it. All the rest is filling in the blanks.

* * *

As an aid in evaluating the *Wilder* settlement, we have listed our personal litigation goals, bearing in mind that a strong divergence of opinion existed on many of these issues among the lawyers:

ACLU's Goals

1. Assure equal access to quality facilities regardless of the race or religion of the child.
2. Effect a general rise in the quality of available child care by creating a strong incentive to minimize differences in quality among the private agencies.
3. Secularize the system, preferably by dismantling the sectarian agencies or, if that proved impossible, by imposing strict limits on the extent to which religion played a role in placement and treatment.

New York City's Goals

1. Preserve the religiously affiliated agencies because of their generally high quality, and because the social dislocation of rebuilding the child care system would be substantial.
2. Assure that race and religion did not affect equal access to the highest quality facility available.
3. Protect the free exercise rights of children in agencies, protecting them from inappropriate religious pressures.
4. Promote a general rise in quality in the level of child care.

* * *

In retrospect, it was the parties' respective assessments of the litigation risks that each faced, coupled with a common goal of assuring equal access to quality facilities and respect for free exercise values, that made settlement possible.

